United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF OF APPELLANT AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8697 183

ANNETTE PERKINS, Administratrix, c. t. a., Estate of ALVIN S. PERKINS, deceased, *Appellant*

vs.

ROGER BERGER, *Appellee*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

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No. 8697

ANNETTE PERKINS, Administratrix, c. t. a.,
Appellant
vs.
ROGER BERGER, *Appellee*

BRIEF OF THE APPELLANT.

Jurisdictional Statement.

This is an appeal from a final order (R. 24-25), removing appellant as administratrix, c. t. a., of the estate of Alvin S. Perkins, deceased as a result of action instituted by appellee, Roger Berger, and appointing Needham Turnage as administrator, c. t. a., d. b. n., in the place and stead of appellant. Jurisdiction is invoked in and by virtue of Title 17, Section 101, of the Code of Laws for the District of Columbia, permitting any party aggrieved by any final order of the District Court of the United States to appeal therefrom to this Court.

Statement of Case.

The only question herein involved is whether or not the Court below was justified in removing appellant as admin-

istratrix, c. t. a. of decedent's estate solely because of the relationship of appellant as mother and son where it appears that appellant was also a creditor of said decedent, and the statute of limitations might be involved in consideration of her claim, for which reason appellant was deemed unsuitable to continue as fiduciary.

The decedent, Alvin S. Perkins, died in the summer of 1938, and on August 9, 1938, decedent's last will and testament (R. 5-6) was filed in the Office of the Register of Wills for the District of Columbia. Subsequently, said will was admitted to probate and record (R. 7, 8, 9) and appellant, thereupon, was granted letters of administration with the will annexed by order of the court below, dated November 4, 1938. In her petition for appointment (R. 3, 4, 5 and 6), filed September 10, 1938, appellant set forth claims against decedent's estate due to herself of approximately Eight Thousand Dollars ($8,000.00).

Thereafter, appellant proceeded with the orderly administration of decedent's estate until appellee instituted action in the District Court in an effort to obtain appellant's removal as administratrix, alleging as grounds therefor that appellant, being the mother of the decedent and also having made certain claims against decedent's estate as creditor, which said claims, appellee alleged, were questionable and which were further alleged to be barred by the statute of limitations in their entirety and that, accordingly, appellant was not a suitable person to continue as administratrix, c. t. a., of said estate and that a disinterested person should be appointed in her place and stead. Appellee further alleged on information that the administratrix, c. t. a., was using estate funds for purposes other than the administration of the estate (R. 10-14).

Relying upon the provisions of Title 18, Section 515 (then Section 341) of the Code of Laws for the District of Columbia, making discretionary the plea of the statute of limitations by an executor or an administrator and, further, denying any misuse of administration funds, appellant contested this action.

The matter was duly heard before Mr. Justice Letts of the District Court and, on October 27, 1943, findings of fact and conclusions of law were entered by Mr. Justice Letts (R. 23-24) in which the Court found that, because of the relationship of Annette Perkins, administratrix, c. t. a., and the decedent, Alvin S. Perkins, as mother and son, respectively, the said Annette Perkins was not a suitable person to exercise the discretion of an administratrix as to whether or not the statute of limitations should be pleaded to her individual claims as a creditor against said decedent's estate and the court concluded as a matter of law that, *solely* upon such grounds appellant should be removed as administratrix, c. t. a., of her son's estate. (Italics ours.)

Thereupon an order was entered by the Court (R. 24-25) in which it was stated that, it appearing to the Court to be to the best interests of the estate that a disinterested party serve as fiduciary, appellant should therefore be removed as administratrix, c. t. a., no other ground for removal being either stated therein or in fact, found by the Court.

Statutes Involved.

Title 11, Section 504, District of Columbia Code (1940 Edition) states the power of the probate court to be as follows: "It shall have full power and authority to take the proof of wills of either personal or real estate and admit

the same to probate and record, and for cause to revoke the probate thereof; to grant and, for any of the causes hereinafter mentioned, to revoke letters testamentary, letters of administration, * * * and to appoint a successor in the place of anyone whose letters have been revoked; * * *."

Title 11, Section 512 of the District of Columbia Code (1940 Ed.) provides: "The said probate court shall not, under pretext of incidental power, or constructive authority, exercise any jurisdiction whatever not expressly given by this code; * * *."

Title 11, Section 514 of the District of Columbia Code (1940 Ed.) provides: "The court shall have power to order any executor, administrator, collector, guardian, or testamentary trustee, who appears to be in default in respect to the rendering of any inventory or account or the fulfillment of any duty in said court to be summoned to appear therein and fulfill his duty in the premises, on pain of revocation of his power to act; and on his appearing the court may pass such order as may be just; and upon his failure to appear, after having been duly summoned, may revoke his power to act and make such further order and other appointment as justice may require. * * *"

Title 18, Section 515, of the District of Columbia Code (1940 Edition) provides as follows: "It shall not be considered as the duty of an executor or administrator to avail himself of the act of limitations to bar what he supposes to be a just claim, but the same shall be left to his honesty and discretion."

Statement of Points.

1. The probate branch of the District Court of the United States for the District of Columbia is a court of limited

jurisdiction and as such could not legally remove appellant as administratrix, c. t. a., of decedent's estate except for such cause as was permitted by the District of Columbia Code.

2. Appellant, having been guilty of no wrong doing in her administration of decedent's estate, the court erred in ordering her removal.

3. The mere relationship of mother and son existing between appellant and decedent does not make her an unsuitable person to act as administratrix of decedent's estate.

4. The plea of the statute of limitations is entirely discretionary insofar as any administrator or executor is concerned.

Summary of Argument.

1. The court below, having seen fit to appoint appellant upon her petition for appointment as administratrix of decedent's estate, was not justified in ordering her removal as such administratrix for the sole purpose of appointing in her place and stead someone unrelated to decedent. The causes for which an administrator or executor might be removed are enumerated in the District of Columbia Code and no enumerated cause for removal was found to exist by the court.

2. The discretion to plead the statute of limitations rests solely with the administrator or executor and is a right that can not be interfered with by the probate court nor does the probate court have the right to remove one administrator or executor for the purpose of succeeding him with some other person for the sole reason of perhaps obtaining a different exercise of that discretion.

Argument.

Annette Perkins, appellant herein, is the mother of Alvin S. Perkins, the decedent whose estate is concerned. Roger Berger, appellee, is no relation to either the decedent or appellant but was named as a specific legatee in decedent's last will and testament and as residuary legatee of decedent's estate following certain bequests including a life estate to appellant.

On November 4, 1938, appellant obtained an order from the probate court granting to her letters of administration with the will annexed of decedent's estate as the mother and sole heir at law and next of kin of the decedent after she had filed her petition therein setting forth fully her relationship to the decedent as well as apprising the court of the fact that she was a creditor of decedent's estate to the extent of approximately eight thousand dollars ($8,000). It appeared at that time from appellant's petition for letters of administration c. t. a., that the executor nominated by the decedent in his last will and a subsequent executor nominated in a purported codicil thereto were no longer legally competent to act as executor and, accordingly, it is to be presumed that appellant was appointed in accordance with the provisions of Title 20, Section 206, of the District of Columbia Code (1940 Edition) which provides: "If there be neither widow or surviving husband, nor child, nor grandchild to act, the father shall be preferred; and if there be no father, the mother shall be preferred." The foregoing relates to the appointment of administrators of decedents' estates.

After appointment as administratrix, c. t. a., aforesaid, appellant proceeded with her administration of the estate until such time as an accounting was required. After the filing of her account, in which she made claim as a creditor

of the estate in the sum of Eleven Thousand Six Hundred Thirty-one Dollars and Forty Cents ($11,631.40) (R. 10), appellee filed a petition for appellant's removal as administratrix, c. t. a., alleging as his reasons therefor that appellant, being the mother of the decedent, administratrix, c. t. a., of the estate and a creditor thereof as well, was not a suitable person to exercise proper discretion in pleading the statute of limitations which, appellee claimed, was a bar to all of appellant's claims. As an incident thereto, appellee further averred upon information that the administratrix, c. t. a., had used funds of the estate for purposes other than its administration.

In reply to this, appellant relied upon the provisions of Title 18, Section 515, of the District of Columbia Code (1940 Edition) which reserved unto her full and complete discretion as to the plea of the statute of limitations.

In answer to appellee's charge that funds of the estate were being misused, appellant denied that the same were being used for any other purpose than for the administration of the estate which administration included among other things the payment of debts due all creditors including herself. Appellee has at no time contested the merits of appellant's claims, nor filed any exceptions thereto, although this matter has now been pending over four years.

Upon these issues a hearing was had which resulted in a finding by the court that, due solely to the relationship of appellant and decedent, appellant was thereby not a suitable person to exercise proper discretion relating to the plea of the statute of limitations and that, accordingly, she should be removed. It should be noted herein that the court, in entering these findings that this was the *sole* ground for removal of the appellant as administratrix, c. t. a. (R. 23-24) (italics ours).

It is the position of appellant that the probate court acted solely without authority or justification in law in ordering her removal upon the grounds stated by it in its findings of fact and conclusions of law or the grounds stated in the order removing appellant, namely, that it would be to the best interests of the estate to have a disinterested party serve as fiduciary.

The provisions of Title 11, Section 504 of the District of Columbia Code (1940 Edition) provide that the probate court shall have the power and authority to revoke letters of administration and to appoint a successor for any cause set forth in the said Code as a ground for removal of such administratrix. The Code then continues in Title 11, Section 512, to limit the jurisdiction of the probate court by providing that said probate court shall not under the pretext of any incidental power or constructive authority exercise any jurisdiction not expressly provided it by the aforesaid Code.

Subsequent to this, certain grounds for removal of fiduciaries are set forth. Most of these grounds relate to misfeasance or malfeasance in office. The broadest ground stated in any portion of the Code for the removal of an administratrix is contained in Title 11, Section 514, wherein it is provided that any fiduciary who appears to be in default in the fulfillment of any duty required of him may be summoned by the court to appear and fulfill his duty under penalty of revocation of his power to act.

In the present case there was a suggestion by appellee of a default in the fulfillment of appellant's duty, namely, an allegation upon the information that appellant was misusing estate funds. This suggestion was not concurred in by the court. No other default in any duty required of appellant was even suggested to the court, nor found by the court to exist.

Notwithstanding the foregoing, the probate court assumed for itself the right to remove appellant as administratrix, c. t. a., upon a wholly unauthorized ground. Without finding any dereliction whatever in the duties of appellant, the probate court ordered her removed as administratrix solely due to her relationship to decedent. The ground assigned as the basis for this order of removal was to the effect that appellant was, because of her relationship to decedent, not a suitable person to exercise the absolute right of discretion granted to appellant by virtue of the provision of Title 18, Section 515 of the District of Columbia Code (1940 Edition) which states: "It shall not be considered as the duty of an executor or administrator to avail himself of the act of limitations to bar what he supposes to be a just claim, but the same shall be left to his honesty and discretion."

In the opinion of appellant this ruling of the court flies clearly in the face of the provision of the Code for, unquestionably, there are no strings attached to the discretion enjoyed by an administrator or executor under the above mentioned code provision other than his own honesty and discretion. The matter is not subject to collateral attack by heirs at law, next of kin, creditors, legatees, the court or anyone else. To permit the removal herein ordered by the lower court to be affirmed herein would appear further to nullify the full effect of all of the provisions of Title 20, Sections 204 to 216, inclusive, of the District of Columbia Code for, to follow the ruling of the lower court in the present case, one would have to interpolate into each of the foregoing sections a proviso which the Congress of the United States did not see fit to include, namely, a provision to the effect that each of the persons named in the foregoing sections who would be entitled to administer decedent's estate could do so provided that such person was

not also a creditor and provided, further, that, if such person was a creditor, his claim was not barred by the statute of limitations.

Obviously, such provisions were not intended by Congress at the time of the passage of those sections of our Code, for Title 20, Section 216 specifically provides that, if no relatives entitled to apply for administration care to do so, in such event decedent's largest creditor may apply for the same. From the foregoing it becomes immediately obvious that the formulators of our Code had no objection to a creditor acting as administrator and, further, that, under such circumstances there was still no restriction to be impressed upon a creditor acting as administrator insofar as the statute of limitations is concerned for the provision relating to the discretionary plea of the statute of limitations was passed on the same day as the provision making creditors eligible as administrators, namely, March 3, 1901.

The nub of the question thus presented by the action of the lower court boils down to the right of that court to remove appellant who had been found guilty of no wrong doing solely because of her apparent refusal to plead the statute of limitations to personal debts claimed to be due her individually by the decedent.

So far as appellant is advised, the foregoing presents a novel question for determination by this Court. There appear to be no reported decisions from this Court authorizing or permitting the removal of an administrator or executor upon such grounds. However, the provisions of our Title 18, Section 515, have been taken almost *in totc* from Article 93, Section 103, of the Code of Laws for the State of Maryland. Article 93, Section 103 of the Maryland Code provides as follows:

> "It shall not be considered as the duty of an admin istartor or executor, to avail himself of the act of limitations to bar what he supposes to be a just claim, but the same shall be left to his honesty and discretion. One of two or more administrators or executors, however, may avail himself of the act of limitations on behalf of all of the administrators, or executors, and his act in so doing shall be taken to be the act of all the administrators or executors."

The Maryland courts have on occasion been called upon to determine the question of whether or not an executor or an administrator can or should be removed upon his failure or refusal to plead the statute of limitations to a supposedly just claim.

Such a case was Dunnigan vs. Cummins, 115 Md. 289. This was an appeal from an order of the Orphans' Court of Harford County, Maryland, removing an administrator for his failure to defend certain suits brought against the estate which he was administering. The petition alleged that the suits were upon old claims without merit which were barred by the statute of limitations. The administrator answered that the petition was being filed for his removal in order to compel him to plead the statute of limitations to said claims which he declined to do feeling that he had full discretion as to whether or not the statute should be pleaded.

The Court of Appeals of the State of Maryland found that the evidence did not sustain the removal of the administrator on the grounds of his purported refusal to defend the claims aforesaid and in passing further upon the right of an administrator to be removed by reason of his failure or refusal to plead the statute of limitations the court said at Page 297 as follows:

> "* * * It is true the administrator refused to plead the Statute of Limitations, but was he under the evi-

dence in this case legally required to do so? And did his failure or refusal to plead the statute legally warrant the revocation of his letters of administration? Article 93, Section 97 of the Code of 1904, provides that 'It shall not be considered as the duty of an administrator to avail himself of the Statute of Limitations to bar what he *supposes to be a just claim,* but the same shall be left to his *honesty* and *discretion.*' "

Further, at Page 298 it was also said:

"In the case of *Miller, Admr. v. Dorsey,* 9 Md. 323, this Court said: 'To his (the administrator) discretion and conscience alone is confined the propriety and justice of the interposition of the plea of limitations; with this the Orphans' Court has nothing to do.' *Gordon v. Small,* 53 Md. 559; *Semmes, Excr. v. Young's Admr.,* 10 Md. 247. Under the provisions of the Code above referred to, if the administrator, in the honest exercise of his judgment, supposes the claim to be just, it is then discretionary with him whether he shall plead the Statute of Limitations.

"The evidence in this case does not disclose that the motives and conduct of the administrator in supposing these claims to be just and in refusing to plead the statute, were either fraudulent or dishonest. It was discretionary with him whether he should plead the statute."

To somewhat like effect, although the removal of the administrator was not requested, the question turning solely upon the approval of his account, the Maryland court stated in *Miller vs. Dorsey,* 9 Md. 317, at Page 323 as follows:

"* * * In either case the administrator is, in the first instance, the only judge whether the claim shall be paid or not. To his discretion and conscience alone is confided the propriety and justice of the interposition of the plea of limitations; with this the Orphan's Court has nothing to do."

The court then went on to say that whatever defenses, if any, an executor or an administrator desires to make to

any given claim was solely within the discretion of the administrator or executor and depended upon the exercise of his discretion alone under the circumstances of each particular claim and that it was not within the province of the Court of Appeals nor the Orphan's Court to decide what defenses, if any, of those within his power, an executor or an administrator might be required to exercise in a given case.

The Maryland Court further, in the case of *Semmes vs. Young,* 10 Md. 242, held that the claims of administrators or executors stand on exactly the same footing as those presented by other creditors and that administrators or executors may retain funds for their own claims and are not required to plead the statute of limitations. The court held further that, where a creditor is also administrator, the statute of limitations can have no effect upon his claim.

> "That a part payment by an administrator will take a case without the operation of the statute, as against the administrator d. b. n., was settled by this court, in *Quynn v. Carroll, (ante,* p. 197). The only difference between the cases is, that here the administratrix was the creditor, and instead of receiving a part payment from another person, as administratrix she retained one thousand dollars, in two sums, as credits on her account. But we do not perceive how this can affect the application of the principle. The claims of administrators are placed on equal footing with others of the same nature; *Act of 1798,* ch. 101, sub-ch. 8, sec. 19. *Owens v. Collinson,* 3 G. & J. 25. They may retain for them when proved and passed; and are not required to plead limitations to the claims of others, if believed to be just; sub-ch. 9, sec. 9. Besides, how is the statute to be avoided, where the estate cannot be closed before it would bar the administrator's claim? He cannot sue himself. This was decided in *State v. Reigart,* 1 Gill 1, where a suit was instituted on an administrator's bond, to recover the amount of a judgment obtained against the administrators. One of the administrators was a creditor of the deceased, and the question was,

whether, in that action, she and her co-obligors on the bond, could set up that claim, as an unpaid debt of the deceased, and thereby reduce the amount which, it was conceded, the plaintiff would otherwise be entitled to recover. One of the objections to her claim was, that it was barred by limitations, (see plaintiff's 19th prayer, page 23,) to which the Court of Appeals said, (page 32:) 'The prayer was properly rejected. Mrs. Stevenson being one of the personal representatives of her husband, could institute no suit against herself, at law; the Act of limitations, therefore, did not apply to the case, and created no bar to the recovery of her claim.' We consider this an adjudication, that so long as the creditor is administrator, the statute can have no effect upon the demand."

Although not deemed essential to its ultimate determination before it, in the case of *Gordon v. Small,* 53 Md. 550, the court touched upon the question of the necessity of an administrator or executor to plead the statute of limitations in exercising his duty in protecting the estate which he represents against improper demands in the following language as found on Page 559:

"The next question is as to the bar of the Statute of Limitations, pleaded by Mrs. Grady.

"In answer to this defense, it would be enough to say that the executor alone had the right to plead the Statute, (Code, Art. 93, sec. 99,) and as he has not thought proper to avail himself of the defense, no other person can do so for him."

The above stated cases seem to completely cover the adjudications available for the enlightenment of the Court in interpreting the effect to be given the Code provisions affording executors and administrators discretion in the plea of the statute of limitations at least under the language used in our Code and the Code of the State of Maryland which, as hereinbefore stated, is practically identical. In all of these decisions the paramount objective of the court

has seemingly been to preserve and maintain a complete reservation of this power for the fiduciary for, in each decision, the court has gone to great length to state that this discretion is one which must be exercised solely by the fiduciary and without molestation or interference by either the trial court or the appellate court. Further, in at least one case, the court has indicated that the refusal or failure to plead the statute of limitations by a fiduciary is not sufficient ground to justify his removal.

In the light of these decisions appellant respectfully submits that, under all of the facts and circumstances and from a full consideration of her rights and privileges as the duly appointed administratrix c. t. a. of decedent's estate, no legal or justifiable cause existed for her removal and that the action of the lower court in removing her as administratrix of her son's estate upon such a frivolous ground as that she was not a suitable person because of her relationship to her son as mother and creditor is wholly unwarranted. So far as appellant is advised, there has never been any decision in this jurisdiction so far-reaching.

Conclusion.

For the reasons hereinbefore stated, it is respectfully submitted that the court below erred in ordering the removal of appellant as administratrix c. t. a. of the estate of Alvin S. Perkins, deceased, upon the grounds stated and in appointing an administrator c. t. a., d. b. n., of said estate and, accordingly, appellant prays that the action of the lower court may be reversed.

Respectfully submitted,

HARRY L. RYAN, JR.,
815 Fifteenth Street, Northwest,
Washington, D. C.,
Attorney for Appellant.

JOINT APPENDIX.
Case No. 8697.

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JOINT APPENDIX.

Case No. 8697.

Last Will and Testament of Alvin S. Perkins.

I, ALVIN S. PERKINS, Lieut. Colonel, U. S. Army, being of sound and disposing mind, memory and understanding, do hereby make, sign, seal, publish and declare the following as and for my last will and testament, hereby expressly revoking any and all previous wills heretofore by me made:

ITEM 1. I direct my Executor, hereinafter named, to pay all my just debts and funeral expenses as soon as practicable after my decease.

ITEM 2. I give and bequeath to ROGER BERGER the sum of One Thousand Dollars ($1,000.00).

ITEM 3. I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal or mixed, including that which I may hereafter acquire, as well as that which I now own, to the MERCHANTS BANK & TRUST COMPANY, of the District of Columbia, absolutely and in fee simple, to be held by it in and upon the following uses and trusts, to wit: To take possession of said property wherever the same may be situated and to hold, manage and control the same for the best interests of my estate, and with that end in view, I give to the said Trustee full and ample power to rent, lease, exchange, manage and encumber the same; to sell the same either at public or private sale, at such time or times as to it may seem wise and expedient, the purchaser or purchasers thereof, or parties dealing therewith, not to be required to see to the application of the purchase or other money, and to invest and re-invest the proceeds thereof, or any part thereof; and to change the

investments which I may have at the time of my
6 death, or which it may make from time to time, under the powers herein given it, as the said Trustee shall deem most advantageous. I direct my said Trustee, however, to permit my mother, ANNETTE PERKINS, to occupy any real property which may be included within the trust estate hereby created, without cost, charge, rent or deduction from the income from my said estate to be paid her as hereinafter directed, and my said Trustee is further directed to refrain from selling, transferring, exchanging or otherwise disposing of any such real estate during any period during which it may be occupied by my mother, ANNETTE PERKINS, as hereinbefore provided, notwithstanding any power heretofore granted to sell, transfer, exchange or dispose of the same. I direct my said Trustee to pay the income accruing and accumulating from my said residuary estate to my mother, ANNETTE PERKINS, during her lifetime, in quarterly installments. Upon the death of my mother, ANNETTE PERKINS, I direct my said Trustee to transfer, assign, convey, and pay over to ROGER BERGER, absolutely and in fee simple, the entire trust estate then in its hands, less only its proper charges, commissions and expenses, and the Trustee will then be fully discharged from its trust.

ITEM 4. I nominate, constitute and appoint the MERCHANTS BANK & TRUST COMPANY, Executor of this my last will and testament.

IN WITNESSES WHEREOF, I have hereunto set my hand and seal this 23 day of November, 1923, in the City of Washington, District of Columbia.

ALVIN S. PERKINS. (Seal)

Signed, sealed, published and declared by the above named testator, ALVIN S. PERKINS, as and for his last will and testament, in our presence, and we at his request, in his presence and in the presence of each other, have hereunto signed our names as attesting witnesses thereto.

Names	*Addresses*
Thos. T. Keller	1401 Girard St., N. W.
Samuel S. April	1909 19th St., N. W.
Wm. T. Reed, Jr.	3626 Conn Ave., N. W.

(Endorsement: Will of Alvin S. Perkins, deceased, dated November 23, 1923. Filed August 9, 1938. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.)

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7 Petition for Revocation of Order Granting Administration, for Admission of Newly-discovered Will to Probate and for Letters of Administration with Will Annexed.

The petition of Annette Perkins respectfully shows to this honorable Court:

1. That petitioner is a citizen of the United States and a resident of the District of Columbia and files this petition as the mother and sole heir at law and next of kin of Alvin S. Perkins, the above-named decedent.

2. That petitioner, respectfully inviting attention to her petition for administration, filed herein on the 3rd day of August, 1938, and the order granting letters of administration to petition, made herein the day of August, 1938, states that since the making of said order (on which letters of administration were not secured) a paper writing dated the 23rd day of November, 1923, to which there is a purported codicil, dated the 24th day of December, 1930, has

been found in the possession of the Hamilton National Bank, of Washington, D. C., and both said documents have been duly filed in the office of the Register of Wills of the District of Columbia. Petitioner was first informed that there was no such will and made her application for administration in this belief.

8 3. That said decedent was never married and is survived by no ascendants or descendants, brothers or sisters or descendants of the same, except your petitioner, his mother, a person of full age.

4. That decedent was not seized or possessed of any real estate in the District of Columbia at the time of his death.

5. That decedent left personal property, consisting of cash, stock, bank deposit, and claims against the United States and individuals, as set forth in paragraph 5 of the petition for administration herein in detail (except that the item of pay as a retired officer for 14 days, amounting to $175.00, was paid by the United States directly to petitioner as mother and therefore comprises no part of decedent's estate), amounting, approximately, to the sum of $11,946.18.

6. That decedent, to the best of your petitioner's information and belief, left debts of approximately the following amounts:

Due on stock of The Porter, Inc. (an apartment house)	$ 2,106.32
Due City Bank, Washington, D. C., as of February 28, 1938	2,000.00
Interest on two preceding items (estimated)	500.00
Miscellaneous expenses of last illness and bills paid by your petitioner	1,163.37
Cash due petitioner for loans and as her share of profits on the sale of certain	

houses and lots in State of Maryland: Money advanced, $3,630.00; profits on two houses, $2,445.00; profits on two lots, $568.90	6,643.90
Total indebtedness	$12,413.59

Petitioner did not set forth the debts due her in her petition for administration as, regarding herself as the sole beneficiary in intestacy and there appearing to be ample assets to pay debts other than her own, her claim, under such circumstances, would in effect have been against herself.

7. That, as will appear from inspection thereof, the said paper writing, dated the 23rd day of November, 1923, designated as executor thereunder the Merchants Bank and Trust Company and the purported codicil thereto,
9 dated the 24th day of December, 1930, merely designated the Federal American National Bank and Trust Company, of Washington, D. C., as executor, in place of the executor earlier named, and had no other direction and in no wise affects the earlier paper writing aforesaid. That both the institutions named are no longer legally competent to act as executor and no other institution has succeeded to the powers and authority granted to either of them. Hence your petitioner respectfully represents that she should be excused from the expense and difficulty of offering the alleged codicil for probate, the witnesses thereto apparently being citizens of the State of California (if living) to your petitioner unknown.

8. That petitioner, as mother and sole heir at law and next of kin of the decedent, makes this application for letters of administration with the will annexed, in the absence of a duly designated and existing executor.

WHEREFORE, the premises considered, your petitioner prays:

(a) That the order granting administration herein to your petitioner, dated the day of August, 1938, be revoked;

(b) That the said paper writing, dated the 23rd day of November, 1923, be admitted to probate and record as the Last Will and Testament of Alvin S. Perkins, deceased, and that the alleged codicil thereto, dated the 24th day of December, 1930, be denied probate, *or*, in the alternative, if the Court shall deem it necessary, that the same be admitted to probate and record as a codicil to said paper writing;

(c) That Letters of Administration, with the Will Annexed, be granted unto your petitioner under a special undertaking; and

(d) That your petitioner have such other and further relief as to the Court may seem just and proper.

ANNETTE PERKINS.
ANNETTE PERKINS.

F. G. MUNSON,
Attorney.

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10 District of Columbia, ss.:

ANNNETTE PERKINS, being duly sworn, deposes and says: That she is the petitioner in the foregoing petition and duly subscribed the same and that the same is true of her own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters she believes it to be true.

ANNETTE PERKINS.

Sworn to before me, this 8th day of September, 1938.

THOMAS S. BLANDFORD,
Notary Public.
Washington, D. C.

Thomas S. Blandford
NOTARY PUBLIC

My Commission expires on November 1, 1940

DISTRICT OF COLUMBIA

(Endorsement: Petition for Revocation of Order Granting Letters of Administration, for Probate of Will, and for Letters of Administration c. t. a. Filed September 10, 1938. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.)

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11 Order Revoking Order Granting Administration, Admitting Will to Probate, Denying Probate to Codicil, and Granting Letters of Administration with the Will Annexed.

Upon consideration of the petition of Annette Perkins, mother of Alvin S. Perkins, the above-named decedent, filed herein the 10th day of September, 1938, and it appearing that a paper writing, dated the 23rd day of November, 1923, to which is a purported codicil, dated the 24th day of December, 1930, has been discovered since an order, dated the 3rd day of August, 1938, was entered herein, granting letters of administration unto said Annette Perkins, and said paper writing and alleged codicil thereto having been filed in the office of the Register of Wills of the District of Columbia;

And it further appearing that said Alvin S. Perkins departed this life, a resident of the District of Columbia, on the 14th day of April, 1938, leaving said Annette Perkins, his mother, as his sole heir at law and next of kin;

And it further appearing that the said paper writing, dated the 23rd day of November, 1923, has been fully proved by the testimony of the three subscribing witnesses thereto;

And it further appearing that neither the Merchants Bank and Trust Company of the District of Columbia, designated in said paper writing as the sole executor and trustee, nor its successor the Federal-American National Bank and Trust Company of Washington likewise
12 designated in the alleged codicil as the sole executor and trustee and superseding said Merchants Bank and Trust Company of the District of Columbia, is now legally competent to act as executor and trustee as aforesaid, and the said Federal-American National Bank and Trust Company of Washington having, by its receiver, duly renounced the executorship conferred upon it in the alleged codicil, as appears from its renunciation, dated the 30th day of September, 1938, filed herein the 5th day of October, 1938;

And it further appearing that the alleged codicil, dated the 24th day of November, 1930, contains no provision or direction whatsoever except the designation of said Federal-American National Bank and Trust Company of Washington as executor and trustee, in place of said Merchants Bank and Trust Company of the District of Columbia as the same, and said codicil would therefore be inoperative and without legal effect if admitted to probate and record, it is, by the Court, this 4th day of November A. D., 1938,

ORDERED, ADJUDGED AND DECREED:

(a) That the order granting administration herein unto Annette Perkins, dated the 3rd day of August, 1938, be and the same hereby is revoked;

(b) That the paper writing, dated the 23rd day of November, 1923, aforesaid be and the same hereby is admitted to probate and record as the Last Will and Testament of Alvin S. Perkins, deceased; and

(d) That Letters of Administration with the Will Annexed be and the same hereby are granted unto Annette Perkins, mother and sole heir at law and next of kin of said decedent, upon her giving an undertaking, in the penalty of $14,000.00, with good and sufficient surety, to be approved by the Court, conditioned for the faithful performance of her trust.

PEYTON GORDON,
Justice.

Filed November 4th, 1938.

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13 Amended Petition for Removal of Administratrix c.t.a. and the Appointment of an Administrator c.t.a., d.b.n.

(Filed September 18th, 1941.)

The petition of Roger Berger respectfully represents to this Honorable Court as follows:

1. That on the 9th day of November, 1938, in accordance with a petition previously filed, letters of administration *c. t. a.* were granted to Annette Perkins upon the Estate of Alvin S. Perkins, deceased, and she filed a general undertaking in the penalty of $14,000.00, which undertak-

ing, with the United States Fidelity and Guaranty Company, a corporation, as surety, was duly given, approved and filed in accordance with the order of appointment.

2. On November 9, 1938, an inventory of money and debts showed the value of the Estate at approximately $14,000.00.

3. In the original petition the Administratrix c. t. a. placed the assets at $12,121.18, with debts totalling $5,028.50, and in the amended petition filed in the cause the Administratrix *c. t. a.* places the claims at $12,413.59, and herself as the principal claimant.

4. On December 27, 1939, the Administratrix *c. t. a.* filed an account in which she sets up herself as the claimant of all the funds over and above the legitimate claims.

5. On February 7, 1940, the Administratrix *c. t. a.* filed a claim against the Estate on her own behalf in sums totalling $11,631.40.

6. Your petitioner is the residuary legatee under
14 the Will of Alvin S. Perkins, deceased, and avers that all of the claims listed by the Administratrix *c. t. a.* on her own behalf against the Estate are very questionable claims and all are barred by the Statute of Limitations, and your petitioner feels that a disinterested person should be appointed the Administrator of the Estate of Alvin S. Perkins, deceased, and who would be in a position to properly refuse to pay any but legitimate claims against this Estate, so that the interests of your petitioner would be protected.

Upon information received your petitioner avers that the funds held by the Administratrix *c. t. a.* have been deposited in the Riggs National Bank and that they are being used by the Administratrix *c. t. a.* for purposes other than the administration of this Estate.

WHEREFORE, the premises considered, your petitioner respectfully prays:

1. That a rule issue out of this Honorable Court directed to the said Annette Perkins, Administratrix *c. t. a.* to show cause, if any she has, why she should not be removed forthwith as such Administratrix *c. t. a.*

2. And for such other and further relief as the nature of the case may require and to the Court may seem meet and proper.

ROGER BERGER,
Petitioner,
208 South Marshal Street,
Martford, Connecticut.

CORNELIUS H. DOHERTY,
1010 Vermont Avenue, N. W.
Washington, D. C.
Attorney for Petitioner.

DISTRICT OF COLUMBIA ss.

ROGER BERGER, being first duly sworn, deposes and says that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

ROGER BERGER.

Subscribed and sworn to before me this 21st day of July, 1941.

ROLAND E. DUPONT,
Notary Public.

(Seal)

16 **Answer of Annette Perkins to Amended Petition of Roger Berger for Her Removal as Administratrix, c.t.a.**

The answer of Annette Perkins to the amended petition of Roger Berger heretofore filed herein, pursuant to order of Court first had and obtained, respectfully represents unto the Honorable Court as follows:

1. Respondent hereby restates the matters and facts contained in her answer to the original petition filed by the said Roger Berger and in addition thereto, respondent further avers that the claims asserted by her against the estate of the decedent herein are valid and subsisting claims and that said claims are not barred by the Statute of Limitations, and further that said respondent, as administratrix, *c. t. a.* of the Estate of the decedent herein, in and by virtue of Section 341 of the Code of Laws of the District of Columbia is afforded the opportunity of pleading the Statute of Limitations within her own discretion. Respondent avers that she does not desire to plead the Statute of Limitations to any claim or demand heretofore asserted against the estate of the decedent herein.

17 Respondent denies that the funds held by her in the Riggs National Bank as administratrix, *c. t. a.* of this estate are being used by her for any purpose other than the administration of this estate, but respondent avers that said funds are being used for the payment of debts due her and for the maintenance of living quarters for her in accordance with the provisions of decedent's will.

WHEREFORE, having fully answered the amended petition herein, respondent prays that the same may be dismissed with costs.

ANNETTE PERKINS.

HARRY L. RYAN, JR.,
815-15th Street, N. W.,
Washington, D. C.,
Attorney for Administratrix,
Respondent.

DISTRICT OF COLUMBIA, SS.:

ANNETTE PERKINS, being first duly sworn, on oath deposes and says that she has read the foregoing answer by her subscribed and knows the contents thereof, that the same is true to the best of her knowledge, except as to matters therein stated to be upon information and belief as to which matters she verily believes to be true.

ANNETTE PERKINS.

Subscribed and sworn to before me this 24th day of September, 1941.

MARGARET H. RAEDY,
Notary Public, D. C.

Service of a copy of the foregoing answer made by mailing the same to C. H. Doherty Atty. for petitioner at 1010 Vermont Ave. N. W. the 25th day of September, 1941.

HARRY L. RYAN, JR.,
(Seal) *Atty.*

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18 **Motion for Removal of Administratrix c.t.a. and Appointment of an Administrator c.t.a., d.b.n.**

Comes now Roger Berger, residuary legatee under the Will of Alvin S. Perkins, deceased, by and through his attorney, Cornelius H. Doherty, and moves the Court to

enter an order herein removing Annette Perkins as Administratrix *c. t. a.* of the Estate of Alvin S. Perkins, deceased, and to appoint an Administrator *c. t. a., d. b. n.*, and, for reasons therefor, says:

1. It appears by the record herein that the Administratrix *c. t. a.* was a claimant for the entire funds of the Estate.

2. That she has refused to plead the Statute of Limitations to the claims filed by herself as an individual against the Estate.

3. It appears that the Administratrix *c. t. a.* has used the funds of the Estate without authorization.

4. And for other reasons apparent of record.

CORNELIUS H. DOHERTY,
1010 Vermont Avenue, N. W.
Washington, D. C.,
Attorney for Petitioner.

Filed September 9th, 1942.

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20 **Memo in Support of Motion for Removal of Administratrix c.t.a. and Appointment of an Administrator c.t.a., d.b.n.**

The record discloses that on the 9th day of November, 1938, letters of administration were granted to Annette Perkins upon the Estate of her son, Alvin S. Perkins, deceased, and an undertaking in the penalty of $14,000.00 was duly given, approved and filed in accordance with the order of appointment, and an inventory of money and debts showing the value of the Estate to be approximately $14,000.00.

In the original petition the Administratrix *c. t. a.* placed the assets at $12,121.18, with debts totalling $5,028.50, and in the Amended petition filed in the cause after a will was found, which gave a certain part of the property to Roger Berger, she placed the claims at $12,413.59, with herself as principal claimant, and on December 27, 1939, she filed an account in which she set up herself as the claimant of all the funds over and above the legitimate claims, and all her claims were based on matters which have been barred for years by the Statute of Limitations.

This matter has been before the Court on three or four occasions and under the original petition for the removal of the Administratrix there was a rather definite understanding that she would agree to resign as Administratrix *c. t. a.*, and that Joseph Leo McGroary would be appointed in her place and stead, but subsequently this understanding was revoked at a hearing before Mr. Justice Morris.

Thereafter the matter came on before Mr. Justice Pine and it was understood that Harry L. Ryan, Jr., attorney for Administratrix *c. t. a.*, and Cornelius H. Doherty, attorney for Roger Berger, would be appointed in her place and stead, but subsequently Mr. Justice Pine changed his mind, after it had been brought to his attention that there was a possibility that the same situation covering the Statute of Limitations would arise with both of the named parties as joint Administrators of the Estate, and the matter has been pending since that time in the hope that it would probably work itself out.

Practically all the current cash of the Estate has been used by the Administrtrix *c. t. a.* in violation of her trust, and it is respectfully submitted that a disinterested person should be appointed as Administrator *c. t. a., d. b. n.*, in or-

der that a fair and equitable decision of this matter may be reached, and until such person has been appointed there cannot be any proper decision in this matter.

CORNELIUS H. DOHERTY,
1010 Vermont Avenue, N. W.
Washington, D. C.
Attorney for Petitioner.

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22 **Docket Entry.**

1942
Sept 25 Points and authorities in opposition to motion. Filed—Copy mailed.

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23 **Motion for Hearing on Motion for Removal of Administratrix c.t.a. and Appointment of an Administrator c.t.a., d.b.n.**

Comes now Roger Berger, residuary legatee under the Will of Alvin S. Perkins, deceased, by and through his attorney, Cornelius H. Doherty, and moves the Court for a hearing on the motion now pending for the removal of the Administration *c. t. a.* and the appointment of an Administrator *c. t. a., d. b. n.*, for the reasons set forth in the Memo attached to this motion and made a part hereof.

CORNELIUS H. DOHERTY,
1010 Vermont Avenue, N. W.,
Washington, D. C.,
Attorney for Petitioner.

To:

Harry L. Ryan, Jr., Esquire
815 15th Street, N. W.
Washington, D. C.

Please take notice that the points to be submitted in support of this Motion and the authorities intended to be used are attached hereto. The rules of the above entitled Court require that if you oppose the granting of the above motion, you shall, within five days from the date of service of a copy of this motion upon you, or such further time as the said Court may grant, or as the parties to this suit may agree upon, file in reply with the Clerk of said Court, a statement of the points and authorities upon which
24 you rely, and serve a copy thereof upon counsel for the petitioner.

CORNELIUS H. DOHERTY,
1010 Vermont Avenue, N. W.
Washington, D. C.
Attorney for Petitioner.

Copy of the foregoing Motion and Memo in support of Motion acknowledged this 11th day of October, 1943.

HARRY L. RYAN, JR.,
Attorney for Administratrix.

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25 **Memo in Support of Motion for Hearing on Motion for Removal of Administratrix c.t.a. and Appointment of an Administrator c.t.a., d.b.n.**

The record discloses that this matter has previously been before Mr. Justice Morris, at which time counsel for the respective parties had agreed upon the appointment of

Joseph Leo McGroary, after Mr. Justice Morris had indicated his intention of removing the Administratrix *c. t. a.*, and on the date that the order was to be signed the Administratrix appeared in person and objected to this procedure and Mr. Justice Morris stated that it would have to be again set down for hearing.

Subsequently the matter was again set down for hearing on the petition for rule to show cause why the Administratrix should not be removed, and it came on for hearing before Mr. Justice Pine, and after argument, Mr. Justice Pine indicating that he was going to remove the administratrix *c. t. a.*, counsel for the respective parties agreed and consented to an order for the appointment of both of them to administer the Estate of the decedent, Alvin S. Perkins, and this order, consented to by both counsel, is now in the jacket, but the Register of Wills, in a memo to Mr. Justice Pine prior to the time it was to be signed, indicated that it appeared that counsel had antagonistic positions in this matter and, unless it could be agreed as to whether or not the Statute of Limitations could be pleaded, that it would not be advisable to sign this order, and the order was
26 not signed. Subsequently, the matter was again set down on motion for the removal of the Administratrix *c. t. a.*, in which the previous facts were set forth, and referred to the petition for a rule to show cause, which disclosed that the Administratrix *c. t. a.* had used practically all the current cash of the Estate in violation of her trust, and the Auditor of Riggs National Bank was subpoenaed to appear in Court and bring the records which would disclose this fact. The matter came on before Mr. Justice McGuire near the end of the morning, and before argument was completed Mr. Justice McGuire stated that he would give counsel further time, at any time they would agree to appear either in court or his office, to discuss this

matter, and with the statement that it was not necessary for the Auditor of Riggs Bank to remain, Mr. Ryan conceding that the records of the Bank would disclose the fact that practically all the money had been used, but with the statement that it was used to pay these debts due the administratrix *c. t. a.*

Apparently Mr. Justice McGuire overlooked the statement that he would wait for further argument on this matter, and filed a memorandum which was partially based upon the fact that the allegation of dereliction was wholly unsupported in the record and it was then brought to Mr. Justice McGuire's attention that the petition alleged the fact that the money had been used, and further that the Auditor had been present in Court with the records to prove that fact, and counsel for the parties hereto agreed to let the matter rest for the time being, and that it would be brought up for a hearing at some future date, and it is now requested that this matter be again reviewed by the Court.

The record discloses that on August 3, 1938, Annette Perkins filed a petition for letters of administration, and on the 9th day of August, 1938, a Will was filed, and the Bank named therein as Executor having gone into
27 the hands of a Receiver, and the Federal American Bank, its successor, disclaiming, Annette Perkins was appointed as Administratrix *c. t. a.* on the 9th day of November, 1938.

Under the Will of Alvin S. Perkins, the Administratrix had a life interest in the Estate, and on her death the entire estate was to go to Roger Berger.

On the 27th day of December, 1939, the Administratrix filed her account, which has not been approved, and on the 7th day of February, 1940, the Administratrix filed a claim

for $11,631.40 for money advanced by her to the decedent, and barred by the Statute of Limitations in some cases for a period of ten years.

The Administratrix *c. t. a.* refuses to plead the Statute of Limitations to the claims filed by herself, and it is contended that the Administratrix *c. t. a.* is not in a position to have discretion as to whether or not the Statute of Limitations should be pleaded, and she has indicated definitely that she will not plead the Statute of Limitations as to her own claims, and it is felt that in fairness to both the Administratrix *c. t. a.*, who is the life tenant, and the residuary legatee that a disinterested person should be appointed to administer the remainder of the Estate.

In the case of Perry vs. Wilson, 60 Appeals, 109, while the appeal went off on another point, Mr. Justice Hitz, while a Justice of the Supreme Court of the District of Columbia, signed an order removing the administrator when it was shown that he had filed a suit in equity claiming a resultant trust in the property of the Estate, and in this case the Administratrix *c. t. a.* has filed a claim for all the property of this Estate, and it is conceded, I believe, by counsel for the Administratrix that her entire claim is barred by the Statute of Limitations, and further that her proof as to the existence of the claim is very scant.

28 Title 12, Section 207 of the 1940 Code has the following:

"No provision in the will of a testator devising his real estate, or any part thereof, subject to the payment of his debts, or charging the same therewith, shall prevent the statute of limitations from operating against such debts, unless it plainly appears to be the testator's intention that it shall not so operate."

There is nothing in the Will of the testator in this case which indicates that the Statute of Limitations should not operate, and it is plainly his desire that the residue of his Estate go to Roger Berger.

It is true that Title 18, Section 515 of the 1940 Code has the following:

> "It shall not be considered as the duty of an executor or administrator to avail himself of the act of limitations to bar what he supposes to be a just claim, but the same shall be left to his honesty and discretion."

and this certainly must have had reference to a disinterested person, for surely a person who is interested would not ordinarily file a plea of the Statute of Limitations to a claim filed by him, and if he felt that the Statute of Limitations did apply then he would file no claim.

In Tennessee an Administrator may waive the Statute as to a general creditor but he cannot do so as to his individual claim against the Estate. Wharton v. Marberry, 3 Sneed, 603.

In Williams vs. Williams, 15 Lea, 438, the Court held such to be the rule even though the testator, in his will, gave the Executor power to pay, if he saw fit, just debts barred by the Statute.

In a number of cases where the personal representative had the discretion to waive the Statute as to barred debts of general creditors it was held to be different when he himself seeks to charge the estate with his own claim
29 which is barred by the Statute, as his honesty is then antagonistic to the Estate, and that the other interested parties should then judge as to the propriety of waiving the Statute as to his claim.

In Pennsylvania a personal representative may waive the Statute as to general creditors but he cannot do so as to his own claim, especially against the objection of a legatee to the allowance of a claim barred in the lifetime of the debtor. Hock's Appeal, 21 Pa. 280.

In New York the Courts have held that there is no doubt as to the duty of a personal representative to interpose the defense of the Statute against any claim barred thereby and as to the personal representative himself the enforcement should be more rigid than in the case of the ordinary claim. Gilbert vs. Comstock, 93 N. Y. 484.

It is respectfully submitted that the Administratrix *c. t. a.* has used the money of the Estate without the proper authority to do so, and counsel will have the records from the Riggs National Bank to prove this fact, and under the circumstances it would be to the interest of all parties concerned that the Administratrix *c. t. a.* be removed and that a disinterested person be appointed in her place and stead.

CORNELIUS H. DOHERTY,
1010 Vermont Avenue, N. W.
Washington, D. C.
Attorney for Petitioner.

(Endorsement: Motion for Hearing on Motion for Removal of Administratrix *c. t. a.* and Appointment of Administrator *c. t. a., d. b. n.* Filed October 12, 1943. Victor S. Mersch, Register of Wills, D. C., Clerk of Probate Court.)

30 **Docket Entry.**

1943
Oct. 18 Points and authorities in opposition to motion by attorney for admix. *c. t. a.* filed—Copy mailed

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31 **Findings of Fact and Conclusions of Law.**

This matter coming on to be heard upon the Motion of Roger Berger, residuary legatee under the will of Alvin S. Perkins, deceased, for the removal of Annette Perkins, administratrix, *c. t. a.*, and for the appointment of an administrator, *c. t. a., d. b. n.*, and after hearing such testimony as was adduced on behalf of the aforesaid Roger Berger, residuary legatee, and argument of counsel, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT.

The Court finds that because of the relationship of Annette Perkins, administratrix, *c. t. a.*, and the decedent, Alvin S. Perkins, as mother and son, respectively, that the said Annette Perkins is not a suitable person to exercise the discretion of an administratrix as to whether or not the statute of limitations should be pleaded to claims of debt filed by herself as a creditor of the estate of Alvin S. Perkins, Deceased.

CONCLUSIONS OF LAW.

From the foregoing facts the Court concludes as a matter of law that Annette Perkins, Administratrix,

32 *c. t. a.* of the estate of Alvin S. Perkins, deceased, should be removed as said administratrix, *c. t. a.*, solely upon the grounds that she is not a suitable person to exercise the discretion of an administratrix in determining the applicability of the statute of limitations to debts claimed by herself as an individual in the administration of decedent's estate herein.

Filed October 27, 1943.

F. DICKINSON RETTS,
Justice.

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33 **Order Removing Administratrix c.t.a., Continuing Undertaking in Full Force and Effect and Appointing an Administrator c.t.a., d.b.n.**

This cause coming before the Court on a hearing upon a Rule to Show Cause, upon the motion of the residuary legatee, Roger Berger, and it appearing to the satisfaction of the Court that it is to the best interests of the Estate that a disinterested party serve as fiduciary in this matter, it is by the Court this 27th day of October, 1943,

ORDERED, ADJUDGED and DECREED that Annette Perkins be, and she hereby is, removed as Administratrix *c. t. a.* of the Estate of Alvin S. Perkins, deceased; that the undertaking heretofore given by her in the penalty of $14,000.00 be, and the same is hereby, continued in full force and effect, and that Needham Turnage be, and he hereby is, appointed Administrator *c. t. a., d. b. n.* upon his giving an undertaking in the penal sum of twelve thousand dollars, conditioned for the faithful performance of his trust, and it is further

ORDERED that the said Administrator *c. t. a., d. b. n.*, herein appointed, proceed forthwith to recover the unadminis-

tered balance of the Estate of this decedent, and, to that end, to take such action as may be necessary upon the official undertaking of the said Annette Perkins, Administratrix *c. t. a.*, and upon a recovery of the said assets to account for them in this cause in accordance with the Code of Laws for the District of Columbia.

By the Court:

F. DICKINSON RETTS,
Justice.

Seen:
C. H. DOHERTY,
Atty. for Petitioner.
HARRY L. RYAN, JR.,
Atty. for Administratrix.
Objection.

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34 **Notice of Appeal.**

Notice is hereby given this 27th day of November, 1943, that Annette Perkins hereby appeals to the United States Court of Appeals for the District of Columbia from the order of this Court entered on the 27th day of October, 1943 in favor of Roger Berger against said Annette Perkins.

HARRY L. RYAN, JR.,
Attorney for Petitioner,
815 15th St. N. W.

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35 **Order Extending Time for Filing Record on Appeal.**

Upon consent of counsel for all parties hereto and it appearing to the satisfaction of the Court that reasonable

cause therefor has been duly shown and that the time within which the record on appeal should have been filed has not expired, it is, therefore, by the Court this 5th day of January, 1944,

ORDERED: That the time within which the said record on appeal may be filed be and the same hereby is extended to and including January 31st, 1944.

T. ALLEN GOLDSBOROUGH,
Justice.

We Consent:
HARRY L. RYAN, JR.
Attorney for Annette Perkins.

CORNELIUS H. DOHERTY,
Attorney for Roger Berger.

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36 **Order Extending Time for Filing Record on Appeal.**

Upon consent of counsel for all parties hereto and it appearing to the satisfaction of the Court that reasonable cause therefor has been duly shown and that the time within which the record on appeal should have been filed has not expired, it is, therefore, by the Court this 26th day of January, 1944,

ORDERED: That the time within which the said record on appeal may be filed be and the same hereby is extended to and including the 21st day of February, 1944.

T. ALLEN GOLDSBOROUGH,
Justice.

We Consent:
HARRY L. RYAN, JR.
CORNELIUS H. DOHERTY.

37 **Stipulation for Designation of Record on Appeal.**

It is hereby stipulated and agreed by and between Harry L. Ryan, Jr., Attorney for Annette Perkins, Administratrix, *c.t.a.*, of the Estate of Alvin S. Perkins, deceased, appellant herein, and Cornelius H. Doherty, Attorney for Roger Berger, Appellee herein, that the following shall constitute the record for transmittal to the United States Court of Appeals for the District of Columbia on the appeal previously noted herein.

1. Petition of Annette Perkins for letters of administration, filed August 3rd, 1938.

2. Order granting letters of administration to Annette Perkins, dated August 3rd, 1938.

3. Last will and testament of Alvin S. Perkins, dated November 23rd, 1923, filed August 9th, 1938.

4. Petition of Annette Perkins for revocation of order granting administration and for probate and record of will and for denial of codicil to probate or, in the alternative, if necessary for probate and record and for letters of administration, *c.t.a.*, with special undertaking, filed September 10th, 1938.

38 5. Order revoking order of August 3rd, 1938, and admitting will to probate and record, filed November 8th, 1938.

6. Amended petition for removal of administratrix, *c.t.a*, and appointment of an administrator, *c.t.a., d.b.n.*, filed September 18th, 1941.

7. Answer of Annette Perkins to amended petition filed September 25th, 1941.

8. Motion for removal of administrator, *c.t.a.*, and appointment of administrator, *c.t.a., d.b.n.*, filed September 9th, 1942.

9. Memorandum of docket entry of filing opposition to motion for removal of administratrix, filed September 25th, 1942.

10. Motion for hearing on motion for removal of administratrix *c.t.a.*, filed October 12th, 1943.

11. Memorandum of docket entry of filing opposition to motion for removal of administratrix, *c.t.a.*, filed October 18th, 1943.

12. Findings of fact and conclusions of law, filed October 27th, 1943.

13. Order removing administratrix, *c.t.a.*, and continuing undertaking in effect, filed October 27th, 1943.

14. Notice of appeal, filed November 27th, 1943.

15. Order extending time for filing record on appeal, filed January 5th, 1944.

16. Order extending time for filing record on appeal, filed January 26th, 1944.

17. This designation of record.

HARRY L. RYAN, JR.,
CORNELIUS H. DOHERTY.

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8697

ANNETTE PERKINS, Administratrix c. t. a., Estate of ALVIN S. PERKINS, deceased, *Appellant*

vs.

ROGER BERGER, *Appellee*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

CORNELIUS H. DOHERTY
1010 Vermont Avenue
Washington, D. C.
Attorney for Appellee

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
CHARLES W. WARDEN, WASHINGTON REPRESENTATIVE,
TOWER BUILDING

SUBJECT INDEX.

Cases Cited.

Statute Cited.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8697

ANNETTE PERKINS, Administratrix c. t. a., Estate of ALVIN S. PERKINS, deceased, *Appellant*

vs.

ROGER BERGER, *Appellee*

BRIEF OF APPELLEE

Counter Statement of Case.

Alvin S. Perkins died apparently intestate, and his mother, the appellant, applied for letters of administration on his Estate, which were granted. Subsequently a Will was found designating the Merchants Bank and Trust Company as the Executors and Trustees of the Will (App. 1).

Under the Will of Alvin S. Perkins, the appellant was given a life use in any real estate the decedent might have at his death, together with any income accruing from the residuary estate during her lifetime, and on her death the estate was to go to Roger Berger, the appellee.

The appellant then filed a petition to have the letters of administration revoked and to permit probate of the Will and to give to appellant letters of administration with the Will annexed (App. 3), and on November 4, 1938, an order was signed admitting the Will to probate, and granting let-

ters of administration c. t. a. to appellant (App. 7). No claim was filed by the appellant against the Estate until February 7, 1940, and the claim has never been passed upon by the Probate Court, and in the petition filed by the appellee (App. 10) it is stated that the claims listed by the appellant are very questionable and all barred by the Statute of Limitations, and, in some instances, for a period of ten years, and further that the funds of the Estate were being used for purposes other than the administration of the Estate.

The answer of the appellant (App. 12) admits that the funds are being used for the payment of debts due appellant and for the maintenance of living quarters for her in accordance with the provisions of the decedent's Will.

The record (App. 17-19) discloses that counsel had agreed that an outside attorney should be appointed administrator of this Estate, and that this agreement was revoked by the appellant (App. 15).

Subsequently it was agreed that both counsel should act as administrators and later the entire matter was submitted to Mr. Justice Letts on the petition for the appellant's removal, and the appellant was removed solely on the grounds that she was not a suitable person to exercise the discretion of an administratrix in determining the applicability of the Statute of Limitations to the debts claimed by appellant as an individual.

Statutes Involved.

In addition to the various Statutes cited by the appellant, the appellee will make reference to Title 18, Section 512 of the 1940 Code, which is as follows:

> "In no case shall an executor or administrator be allowed to retain for his own claim against the decedent, unless the same be passed by the probate court, and every such claim shall stand on an equal footing, with other claims of the same nature. (Mar. 3, 1901, 31 Stat. 1244, ch. 854, §339.)"

Summary of Argument.

The action of the Trial Court in removing the appellant as the Administratrix c. t. a. was proper, for it is apparent that the decedent desired some outside, disinterested person to be the Executor of his Will, so that the terms of the Will would be fulfilled.

The appellant was not entitled to any preference under the Statute, for, if any preference existed, that preference would be on behalf of the appellee, the residuary legatee under the Will, and the Court, on it being brought to its attention, that the interests of the appellant as Administratrix were antagonistic to the interests of the residuary legatee, could and properly should remove the appellant and appoint a disinterested person to administer the Estate.

Argument.

While there is no definite statement that the decedent desired a disinterested person to be the Executor or Administrator of his Estate, nevertheless, it is apparent that it was the desire of the decedent and that his mother should not be.

In the event of the decedent's death intestate, the appellant in this case would have the preference to the administration by reason of her relationship, and in the original petition filed by the appellant no mention was made of any claim that she might have against the Estate, but she had no preference to her appointment once the Will was found, and so far as the record discloses the appellee never received any legal notice of any of the proceedings in this case until some time prior to the filing of the original petition, when he had received notice of the fact that the claims of the appellant against the Estate exceeded the value of the Estate, and it was after he had received notice of this fact that the original petition for the removal of the appellant was filed.

Under ordinary circumstances, where a claim is filed against an Estate, after it has been entered in a Claims Book in the Probate Court, it is referred to the Administrator, who passes upon the legality of the claim, and, if the Administrator questions this claim, it is denied, in writing, and the creditor or claimant may then file a suit against the Administrator in the District Court of the United States for the District of Columbia, within nine months of its denial, and both parties then have their day in Court.

In the instant case the appellant filed an account on December 27, 1939, in which she set herself up as the claimant of all funds over and above the legitimate claims against the Estate, and this account has never been passed upon, and on the 7th of February, 1940, the appellant filed a claim against the Estate on her own behalf in sums totalling $11,631.40 (App. 10).

In the amended petition filed by the appellee it was definitely alleged that the claims were very questionable and further that they were all barred by the Statute of Limitations and further that the funds of the Estate were being used by the appellant for purposes other than the administration of the Estate, and the appellant, in her answer to this petition (App. 12), admitted that the funds were being used for the payment of debts due her, and for the maintenance of living quarters for her in accordance with the provisions of decedent's Will.

The Will permitted the appellant only the income from the Estate for her life and did not permit the use of the assets for the maintenance of living quarters.

It is true that the Code permits a certain amount of discretion in the Administrator as to whether the Statute of Limitations shall be pleaded, but it assumes that the Administrator is a person who has no interest in the estate and is a proper person to exercise the discretion, but it is submitted that the appellant was highly interested in the outcome of this matter, and, therefore, not capable of exer-

cising an honest discretion as to whether or not the Statute should be pleaded.

The appellee would have no way of contesting the claims of the appellant, and the only honest and fair way would be to have the appellant submit her claims to a disinterested person as Administrator, and if these claims were denied she would have her day in Court by filing a suit against the Administrator, and if she is entitled to judgment on her claims the Court would so rule.

All the Maryland cases referred to by counsel for the appellant are cases where on the record the Administrator had no interest in the claim, and, therefore, his discretion as to whether or not the Statute of Limitations should be pleaded was held proper.

Counsel for the appellant stresses the point that the appellant was removed because of her relationship with the decedent, but the Court (App. 24) stated that she should be removed solely upon the grounds that she is not a suitable person to exercise the discretion of an administratrix in determining the applicability of the Statute of Limitations to debts claimed by herself as an individual in the administration of decedent's estate.

Had these facts been presented to the Probate Court at the time of her application for appointment, surely the Probate Court would not have appointed appellant as Administratrix c. t. a., and now having learned of these facts it is clearly proper that she should be removed, and the Court, under those circumstances, has the authority to do so.

In Emery vs. Emery, 45 Apps. 576, the Court at Page 579 said:

> "It is well settled in Maryland, from whence our probate system is derived, that once letters have been granted to a party upon a misstatement or misconception of the facts, the same may be revoked and the party really entitled thereto appointed. * * *"

In the case of Nichels' Adm'r v. Horsley, 126 Va. 54, 100 S. E. 831, the Court stated as follows:

> "Where there are antagonistic interests, and the probability that the administrator will be called on to conduct litigation between himself individually and himself as administrator of the decedent, it is clear that he should not be appointed; and, if these antagonisms develop after the appointment, he should be removed."

In the case of Perry vs. Wilson, 60 Apps. 109, 48 Fed. (2nd) 1021, Mr. Justice Hitz, then Justice of the Supreme Court of the District of Columbia, signed an order removing Perry as the Administrator of the Estate of his deceased wife when it was shown that he had filed a suit in Equity claiming a resulting trust in the property of the Estate, but this particular item was not passed upon or required to be passed upon in this Court.

There is nothing in the Will of the testator which indicates that the Statute of Limitations should not operate, and it is plainly his desire that, in addition to the legacy of $1,000.00, the residue of his estate go to Roger Berger, and, if the appellant were permitted to continue as the Administratrix c. t. a. of his Estate, the desire of the decedent could be overcome by the appellant without any legal redress on the part of the residuary legatee.

Certain cases were referred to in the Memorandum filed in support of the various motions in the Trial Court and appear in the appendix, and the appellee adopts these references the same as if they were set forth in this brief.

It is respectfully submitted that the appellant is not a proper person who may exercise an honest discretion as to whether or not the Statute of Limitations shall be pleaded to claims filed on her behalf, and further it appears that she has used the funds of the Estate for purposes other than the proper administration of the Estate, and that the action of the Trial Court in removing her and in substituting another in her place and stead was the exercise of a proper discretion which rests in the Trial Court, and that the action of the Trial Court should be affirmed.

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